SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-991

SUNNYSIDE SCHOOL DISTRICT No. 12, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

SUNNYSIDE SCHOOL DISTRICT No. 12, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 29, 1973.

OPINIONS BELOW

Neither the Findings of Fact and Conclusions of Law of the District Court nor the opinion of the Court of Appeals are reported at this time.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on August 29, 1973, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Petitioner brought suit in the Superior Court of the State of Arizona to enjoin The Honorable Jack Williams, Governor and as such Commander-in-Chief of the Arizona Air National Guard from directing or permitting certain training flights over the public junior high school owned and operated by petitioner. While the suit was pending, respondent commenced an action in the District Court to enjoin the proceedings in the Superior Court of the State of Arizona. The District Court granted respondent's prayer for a preliminary injunction on the ground that petitioner's state court suit threatened to result in the issuance of an injunction which might conflict with "exclusive federal jurisdiction" over aircraft operations of the Arizona Air National Guard. The Court of Appeals affirmed on the basis of *City of Burbank v. Lockheed Air Terminal,* ....US .... 93 S. Ct. .... 36 L. Ed. 2d 547 (1973).

The questions presented are:

1. Would an injunction issued against the Governor of the State of Arizona in his capacity as Commander-in-Chief of the Arizona Air National Guard imposing some restraint upon initiating flights at certain times or under certain conditions necessarily conflict with or violate the federal Constitution or federal statute or any validly promulgated regulation?

2. Is the present case controlled by *City of Burbank v. Lockheed Air Terminal,* .... US ...., 93 S. Ct. ...., 36 L. Ed. 2d 547 (1973)?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Supremacy clause (U.S. Const. art. VI, cl. 2); the Commerce Clause (U.S. Const. art. I, Sec. 8, cl. 3); 49 U.S.C. 1301 et seq., and particularly 49 U.S.C. 1431; and 14 C. F. R. Pts. 71-77, 91-97 are the basis of the preemption holding in *City of Burbank v. Lockheed Air Terminal, Inc.,* .... U. S. ...., 93 S. Ct. ...., 36 L. Ed. 2d 547 (1973) and are necessarily involved herein.

STATEMENT

Sunnyside Junior High School, operated by petitioner, is adjacent to Tucson International Airport. The Arizona Air National Guard flies training flights out of Tucson International Airport which disrupt the educational process at Sunnyside Junior High School. Governor Jack Williams of the State of Arizona is the Commander-in-Chief of the Arizona Air National Guard. In March, 1971, petitioner commenced an injunction proceeding against Governor Jack Williams in his capacity as Commander-in-Chief of the Arizona Air National Guard seeking injunctive relief with respect to the training flights.

The defendant challenged the jurisdiction of the trial court to proceed in an original extraordinary writ proceeding in the nature of prohibition in the Arizona Court of Appeals. The intermediate Arizona appellate court adopted the view of the defendant Williams that the trial

court was without jurisdiction to proceed, based upon the concept of federal preemption. *Williams v. Superior Court,* 15 Ariz. App. 480, 489 P.2d 854 (1971) On review, however, the Supreme Court of Arizona reversed the Court of Appeals, *Williams v. Superior Court,* 108 Ariz. 154, 494 P.2d 26 (1972), and remanded the cause for a decision on the merits. After remand and prior to decision, respondent here filed its complaint in the District Court praying that the state court proceeding be enjoined (See generally respondent's Complaint for Injunctive Relief, R. 3-7, and Findings of Fact and Conclusions of Law, R. 81-84). The District Court granted a preliminary injunction (R. 85). Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed in a one-sentence opinion citing only *City of Burbank v. Lockheed Air Terminal,* supra.

REASONS FOR GRANTING THE WRIT

The basic reasons why the writ should be granted are simple. Regulation of aircraft movement is one thing. It is concededly essential that the power to regulate aircraft motion be vested in the national government, which is the only government capable of exercising power coterminous with the limits of aircraft flight potential. Congress has met this need with legislation. 49 U.S.C. 1301 et seq.

Regulation of aircraft flight is one thing; the power or right to initiate or order that a flight should be made (if regulatorily possible) is another. This power to initiate is one step anterior to the power of regulation. It is necessarily subject to the power of regulation. It is this power to initiate or order that flights be made in the first instance, and not the plenary regulatory power of the federal government which petitioner seeks to harness in the state court proceeding.

This is not a case where, if the power of a locality to act were approved, it would necessarily portend an interference with or misregulation of interstate commerce. *City of Burbank v. Lockheed Air Terminal, Inc.,* supra. In that case there was the spectre of a patchquilt of local ordinances, all perhaps reasonable from the standpoint of the individual localities, which would necessarily play havoc with unified national regulation of flight. Interstate commerce is not by allegation or finding involved in this case. Thus, while a local regulation which attempts to prohibit the initiation (or termination) of flight can offend against the commerce clause, that kind of attempted regulation is not present here.

The trial judge found that the Arizona Air National Guard was an organizational component of the Air National Guard of the United States which is a reserve component of the United States armed forces. There was no finding or conclusion, however, that the defendant in the state court litigation was anything but a state officer. The National Guard during peacetime is a state entity. See *Williams v. Superior Court,* 108 Ariz. 154, 494, P.2d 26, (1972) and cases cited therein.

Inasmuch as relief was sought in the state court only against a state official, there was no reason to grant injunctive relief in the District Court on the basis of interference with federal military functions. The Court of Appeals affirmed solely on the basis of *City of Burbank v. Lockheed Air Terminal, Inc.,* supra.

The writ should be granted because the Court of Appeals has misconstrued and misapplied the decision of this Court in *City of Burbank v. Lockheed Air Terminal, Inc.,* supra. The *Burbank* decision should be clarified so that it cannot be interpreted as enlarging upon the proper limits of exclusive federal control.

As is emphasized in the first paragraph of the *Burbank* opinion, preemption is a rule of necessity. The technological and economic nature of commerce by air "imperatively demands" and "admits only of one uniform system, or plan or regulation." *City of Burbank v. Lockheed Air Terminal, Inc.*, supra, 36 L. Ed. 2d at 549, quoting from *Cooley v. Board of Wardens*, 12 How. 299, 319, 13 L. Ed. 996,(1851). *City of Burbank* recognized simply that the federal scheme by which air commerce is regulated would be subverted by a fragmentation by localization of the scheduling power.

States, including state courts, are not ousted from their jurisdiction unless such is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). Here, petitioner sought in the state court some species of injunctive relief against a State official, relative to his role in the initiation of certain training flights. It is of course impossible to anticipate the nature or effect of any order which might have been entered. The lower courts' holding that the state officials' acts are immune from any kind of state court restraint simply because they were subsequently carried out in accordance with federal regulations is to put the regulatory cart before the initiating horse.

Preemption is at bottom a practical concept. Even where state regulation is only supplementary to a national legislative purpose, it is of course intolerable if it creates anomalies, inconsistencies, conflicts and uncertainties as to what is the controlling authority. In the present case, however, the exercise of state court jurisdiction sought by petitioner would not create these problems. An order by the state court directed to a state official to, for example, halve flights during certain school hours could in no sense be impossible or difficult of regulatory accommodation and could

not reasonably be viewed as thwarting or interfering with the purposes of 49 USC § 1431 discussed in *Burbank*, supra.

The *City of Burbank* case should be clarified so as to permit local resolution of controversies between local interests of controversies such as the present one, when such controversies are without implication or effect upon those aspects of aircraft flight and air commerce which must necessarily be nationally and uniformly controlled.

CONCLUSION

It is respectfully resquested that the writ be granted, and that the injunction entered herein be dissolved; and that the injunctive proceeding be dismissed or the District Court be directed to permit the state court proceeding at issue to proceed regularly to adjudication.

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(Appendix Follows)

Appendix

Filed May 23 '72

United States District Court For The District of Arizona

Civil Action No. 72-47-Tucson

United States of America,
Plaintiff,

v.

Sunnyside School District No. 12,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff is the United States of America. The Department of the Air Force is a military department of the United States. The Federal Aviation Administration (hereinafter referred to as F.A.A.) is an agency of the United States.

2. The Air National Guard, pursuant to 10 U.S.C. § 261, is a reserve component of the United States armed forces. The Arizona Air National Guard is an organizational component of the Air National Guard of the United States.

3. Defendant, Sunnyside School District No. 12 (hereinafter referred to as school district) is a public entity and political subdivision organized and existing under the laws of the State of Arizona. Sunnyside Junior High School is operated and controlled by defendant school district, and is located in proximity to Tucson International Airport. Said school is located under and within the geographical area controlled by the F.A.A. for aircraft operations at Tucson International Airport.

4. Defendant school district is plaintiff in an action styled *Sunnyside School District No. 12 v. Governor Jack A. Williams, Commander-in-Chief, National Guard of Arizona,* No. 125520, now pending in the Superior Court of the State of Arizona, in and for Pima County. The school district seeks by that action to permanently enjoin the Arizona Air National Guard, except in emergency situations, from taking off or landing within the airspace immediately above or in close proximity to the school. Decisions have been rendered by the Arizona Court of Appeals (15 Ariz. App. 480, 489 P.2d 854) and the Supreme Court of Arizona (494 P.2d 26). The Pima County, Arizona Superior Court has held final hearings on the merits of the action. Neither the United States nor any agency or officer thereof was a party to the state court action.

5. The Tucson Airport Authority operates and controls the Tucson International Airport, which is in the National Airport System Plan. The F.A.A. has developed and administers a comprehensive air traffic control system for Tucson International Airport pursuant to the authority granted in the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*).

6. The Arizona Air National Guard, pursuant to agreement with the Tucson Airport Authority, has facilities at and operates from Tucson International Airport. A portion of the activities of the Arizona Air National Guard at Tucson International Airport is the training of Air National Guard F-100 pilots. Said training is conducted by employees of the United States in conformity with standards and directives of the Department of the Air Force promulgated pursuant to federal law. Said training program is the only Air National Guard F-100 combat crew training school in the United States, and is vital to the mission of the Air Na-

tional Guard and the United States Air Force in fulfilling their roles in the total defense posture of this country.

7. Tucson International Airport provides necessary and ideal facilities and location for the mission of the Arizona Air National Guard. In operating from said Airport, Arizona Air National Guard aircraft are required to and do fully comply with and conform to regulations and directives of the United States Air Force, the F.A.A. and local F.A.A. control tower personnel. The Arizona Air National Guard also complies with the Formal Runway Use Program implemented by the F.A.A. at Tucson International Airport to alleviate noise, particularly with respect to Sunnyside Junior High School.

Conclusions of Law

1. The United States of America, through the F.A.A., possesses and exercises complete and exclusive national sovereignty in the airspace of the United States, 49 U.S.C. Section 1508(a). The entire scheme of federal legislation, regulation and actual operation of controlling aircraft is so pervasive and comprehensive that Congress has, by adoption of the Federal Aviation Act of 1958 (49 U.S.C. 1301 *et seq.*) preempted the field to the exclusion of local regulation. *Lockheed Air Terminal, Inc. v. City of Burbank,* No. 71-1242, decided March 22, 1972, Ninth Circuit Court of Appeals.

2. The aircraft operations of the Arizona Air National Guard in performing the training program under the supervision of federal employees and pursuant to Air Force standards and directives, are activities performed pursuant to federal laws, regulations, policies and directives.

3. The action brought by defendant school district in state court, styled *Sunnyside School District No. 12 v. Governor Jack A. Williams, Commander-in-Chief, National Guard of Arizona,* threatens to result in an injunction against such training flights. Such an injunction might conflict with the exclusive federal jurisdiction over such aircraft operations, and might be violative of the Supremacy Clause of the Constitution.

4. There is a substantial likelihood that the plaintiff will prevail ultimately on the merits of this action.

5. The public interest favors the issuance of a preliminary injunction.

6. Plaintiff has no adequate remedy at law.

Dated May 23, 1972

/s/ JAMES A. WALSH
United States District Judge

United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,

vs.

Sunnyside School District No. 12,
Appellant.

ORDER

[August 29, 1973]

Appeal from the United States District Court
District of Arizona

Before: HUFSTEDLER, KILKENNY and CHOY, Circuit Judges.

The judgment of the lower court is affirmed on the authority of *City of Burbank, et al. v. Lockheed Air Terminal, Inc., et al.*, ... U.S. .... (May 14, 1973).

SUPREME COURT, U. S.

FILED

JAN 4 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-9911

SUNNYSIDE SCHOOL DISTRICT No. 12, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

Supplement to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,

vs.

Sunnyside School District No. 12,
Appellant.

ORDER

[August 29, 1973]

Appeal from the United States District Court
District of Arizona

Before: HUFSTEDLER, KILKENNY and CHOY, Circuit Judges.

The appellant's motion, which we treat as a petition, for rehearing in the above entitled cause is DENIED.

United States Court of Appeals for the Ninth Circuit

No. 72-2533

United States of America,
Appellee,
vs.
Sunnyside School District No. 12,
Appellant.

MOTION FOR REHEARING

COMES NOW Sunnyside School District No. 12, appellant herein, and moves the Court to rehear, reconsider, and reverse its order and judgment herein entered on the 29th day of August, 1973, affirming the order and judgment of the District Court appealed from herein, on the following grounds:

1. The Court erred in its opinion order in holding that the case was controlled by the case of City of Burbank v. Lockheed Air Terminal, Inc., ... U.S. ..... 36 L.Ed. 2d 547 (rendered May 14, 1973).

2. The Court erred in finding to hold that the issuance of a preliminary injunction was an abuse of discretion.

ARGUMENT

The Court has failed to perceive the essential thrust of the present case which distinguishes it from the City of Burbank case.

The City of Burbank case involved an ordinance, which, if valid, took an entire airport out of national and interstate "pure jet" commerce for one-third of every day. The Supreme Court was manifestly concerned with the fractionalization of control over traffic flow which would result from

a patchquilt of municipal airport curfew laws. See, e.g., the text at note 22 of the majority opinion.

The distinct aspect of the present case can be dramatized by a hypothetical variation on the actual facts of the state court litigation.

Suppose, for some reason peculiar to its function, the Sunnyside School District switched to an educational program in which it had classes only on Mondays and Tuesdays. Suppose also that thereafter, the commander-in-chief of the Arizona Air National Guard (the defendant in the enjoined litigation) for some unknown reason issued a directive that all Air Guard flights were to be flown on Mondays and Tuesday. What, *as a matter of federal law*, would or should prevent an Arizona State Court from requiring the commander-in-chief of the Arizona Guard to direct that flights be made on days other than Mondays and Tuesdays?

The Court in essence has failed to distinguish between *regulation* of aircraft flights and the necessarily prior act of *initiating* or *initially directing* that a flight be made. The direction that a flight be made is subject to a later-exercised power of regulation, but the direction itself is an independent act capable of judicial control.

The federal government as a regulatory power has no interest in whether the original decision as to whether flights are to be undertaken (if regulatorily possible) or not. It is not controlling by relevant here that aircraft flight is federally regulated from take-off to landing. Appellant's state court suit for injunctive relief is in its most basic and important thrust on attack, under the peculiar circumstances, upon an assertedly unlimited right to *initiate* or direct in the first instance that aircraft flights be made.

Interstate commerce is not involved. "Air commerce" is not involved. There is no threat of an intolerable patchquilt of local curfew laws. The state court litigation enjoined below was purely and simply a suit between citizens of the same state over the relative rights of running a public education program and a military flight training school. The court has in effect held that the military training school has leaped or been vaulted into an impregnable and untouchable position merely because the federal government has the sole right to regulate, as opposed to initiate aircraft flights.

The appellee, of course, strenuously argued that the Arizona Air National Guard was a federal agency. This argument was not accepted by the court, since affirmance was based solely on the BURBANK case.

The opinion rendered in this case by the Arizona Supreme Court was an important decision in this vital area of jurisprudence. This court has in effect overruled that decision, without analysis.

The court is respectfully urged to rehear and review its decision herein and to render the only decision which is consonant with our dual federal and state system of justice, that is, that the state trial be given an opportunity to render decision between the two Arizona litigants.

Respectfully submitted this 11th day of September, 1973.

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AFFIDAVIT OF SERVICE

STATE OF ARIZONA }
COUNTY OF PIMA } ss:

Linda Jeffreys, a notary public in the State of Arizona, county of Pima, does hereby certify that on the 11th day of September, 1973 I served the foregoing motion for rehearing upon counsel for the appellee by causing a copy to be mailed, air mail, postage prepaid, to:

Morton Hollander,
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William C. Smitherman
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/s/ LINDA M. JEFFREYS
Notary Public

My Commission Expires:
8/13/77

SUPREME COURT, U. S.

No. 73-991

Supreme Court, U. S.
FILED
FEB 26 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SUNNYSIDE SCHOOL DISTRICT NO. 12, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-991

SUNNYSIDE SCHOOL DISTRICT NO. 12, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue presented is whether the court of appeals erred in affirming the district court's grant of a preliminary injunction against petitioner's further prosecution of a state court action seeking to enjoin certain National Guard flights at the Tucson International Airport as being too noisy, the district court having concluded, *inter alia,* that the government was likely to prevail on its claim that such interference would encroach on matters preempted for federal regulation.

Petitioner, a school district, operates a junior high school near Tucson International Airport. The Arizona Air National Guard uses the Airport for various training flights. All flights from and to the Tucson International Airport, including those of the Guard, are regulated by the Federal Aviation Administration, pursuant to the Federal Aviation Act of 1958, 72 Stat.

737, *et seq.*, as amended, 49 U.S.C. 1301, *et seq.* In operating from that airport, Guard aircraft are required to comply fully with regulations and directives of the United States Air Force, the FAA, and the local FAA control tower personnel (Pet. App. 3). The Guard aircraft also comply with the "Formal Runway Use Program" implemented by the FAA at Tucson International Airport to alleviate noise, with particular respect to the school operated by petitioner and located adjacent to the airport (Pet. App. 1, 3).

In 1971 petitioner filed an action in a state court against the Governor of Arizona, as Commander-in-Chief of the Guard, seeking a permanent injunction against the Guard's use of airspace near petitioner's school, except for emergencies, on the ground that the attendant noise interfered with operations of the school. The Governor claimed that the suit was barred on the ground, *inter alia*, that it intruded upon an area preempted for exclusive federal regulation. Prior to this Court's decision in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, the Arizona Supreme Court upheld the trial court's refusal to dismiss the action (to which the United States was not a party). *Williams* v. *Superior Court*, 108 Ariz. 154, 494 P. 2d 26.

The United States then filed the instant action seeking to restrain petitioner from interfering with exclusive federal regulation of airspace by continuing to prosecute its state court action. After the state court action had been submitted to the court for final decision, the district court granted the government's motion in the instant case for a preliminary injunction against petitioner's further prosecution of the state court action, having concluded that the government was substantially likely to prevail on the merits of its claim of preemption (Pet.

App. 1-4). The court of appeals summarily affirmed on the basis of this Court's decision in *City of Burbank* (Pet. App. 5), and rehearing was denied (Pet. Supp.).[1]

The district court's interlocutory decision on the government's motion for a preliminary injunction does not provide a necessary or appropriate occasion on which to consider the merits of the ultimate legal questions in this case to which the petition is addressed. See, *e.g.*, *American Constr. Co.* v. *Jacksonville T. & K. Ry.*, 148 U.S. 372, 384. The court's action on the motion for a preliminary injunction was not a disposition on the merits. Compare Rule 65(a)(2), Fed. R. Civ. P. Due to possible differences in the scope of relief, or for other reasons, the issues that will be raised by a final judgment in this case may well differ from those petitioner seeks to have decided at this time.

In any event, the issue before this Court in reviewing a preliminary injunction is whether the district court abused its discretion. See *Brown* v. *Chote*, 411 U.S. 452, 457. In view of this Court's decision in *City of Burbank*, the district court did not abuse its discretion in granting a preliminary injunction because of its conclusion that the government was likely to prevail on the merits.

Petitioner does not dispute that there is federal preemption as to airspace management and aircraft movement under the Federal Aviation Act. In *City of Burbank*, this Court noted, moreover, that the Noise Control Act of 1972 "reaffirms and reinforces the conclusion that FAA, now in conjunction with [the Environmental Protection Agency] * * * has full control over aircraft noise,

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[1]The Supplement to the Petition incorrectly states the date of the denial of rehearing as being August 29, 1973 (Pet. Supp.), whereas it was actually September 27, 1973.

preempting state and local control." 411 U.S. at 633. The Court concluded that the pervasive control vested in EPA and FAA under the 1972 Act left "no room for local curfews or other local controls" (*id.* at 638), finding it "obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow." *Id.* at 639. Accordingly, the Court affirmed the issuance of an injunction against the city's enforcement of its ordinance establishing a curfew on jet flights at a privately-owned airport located in the city. At the least, *City of Burbank* strongly suggests that the government is likely to prevail in the instant case.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]If preemption would bar state or local attempts to regulate flights to the extent sought by petitioner, it would seem immaterial whether the form of attempted regulation is statute or ordinance, administrative rule or order, or judicial decision.